

The Board has considered the record and adopted the stipulations listed in the Award. The Board notes the Award fails to list the Deposition of John P. Estivo, D.O., taken by respondent on September 7, 2012, although the ALJ did mention Dr. Estivo at one point in the Award. The Award also fails to list the transcript of Motion Hearing held on August 23, 2012, and the court-ordered independent medical examination report of Terrence Pratt, M.D., dated May 16, 2011. The parties agree all above discussed evidence is part of this record and should have been considered by the ALJ prior to the issuance of the Award in this matter. The Award further fails to include in the calculation the TTD paid by respondent pursuant to the ALJ's Order of August 24, 2012. It is acknowledged the ALJ did not have information detailing the total TTD paid at the time of the Award. But the Award fails to include TTD in any amount in the calculation. By agreement of the parties, the Board was provided a letter from respondent dated May 14, 2013, detailing the amounts and periods of TTD paid pursuant to the ALJ's Order of August 24, 2012. That letter, with the detailed amounts, will be admitted into this record and the information contained therein utilized by the Board in determining this matter.

**ISSUES**

The ALJ found claimant “undoubtedly had a symptomatic protruding disk after the accident” and adopted the opinion of Dr. Brown awarding claimant a permanent partial general (work) disability of 84.5 percent.

Respondent appeals, arguing that the Award should be reversed and claimant denied compensation. In the alternative, respondent argues the Award should be set aside and remanded to the ALJ for a decision based upon the total evidence in the record. Respondent believes that the Award was inadvertently issued without consideration of all of the evidence and without the ALJ reviewing the respondent's submission letter prior to the issuance of the Award.

Respondent's Issues include the following:

1. Did the ALJ consider all of the evidence in the record before rendering the Award? If not, respondent requests this matter be remanded to the ALJ for a determination of the issues, based upon the entire record.

2. Did claimant satisfy his burden of proving he suffered a compensable personal injury by accident that arose out of and in the course of his employment? Respondent acknowledges claimant suffered the accident in question, but denies any permanent impairment resulted from that accident.

3. What was claimant's average weekly wage on the date of accident?

4. Were respondent's due process rights violated when claimant was awarded temporary total disability benefits under K.S.A. 44-523(b)?

5. Are Dr. Brown's medical opinions and testimony admissible after claimant failed to provide medical records in a timely fashion pursuant to K.S.A. 44-515(c)?

6. Did the ALJ address the following liens; Child Support Withholding Orders, Attorney Lien, (Claimant's former attorney Stan Juhnke's fees), and Subrogation Lien stemming from a possible third party action? Is it proper for the Board to address these issues?

Claimant argues the Award should be affirmed.

**FINDINGS OF FACT**

Claimant was hired by respondent on August 26, 2010, to drive a truck full of grain from the elevator to Eaton. His only job was to haul the grain. He rarely had to load and unload the grain, which required getting out of the truck tarping and untarping the truck and

opening the hopper bottoms. Claimant's work hours for respondent varied from day to day. He believes he was paid \$10 an hour.

Claimant testified that on September 21, 2010, he suffered injuries to his back and legs as the result of a motor vehicle accident when he was leaving the Sun Valley terminal. Claimant was heading across Highway 50 onto 61 Highway when another truck struck his truck. The driver of the other truck was cited by police for failure to yield. Claimant was transported via ambulance to the emergency room at Promise Regional Hospital, in Hutchinson, Kansas. X-rays were taken and he was given pain medication.

Claimant returned to work because he was told respondent didn't have workers compensation insurance, and he had bills he needed to pay. He later determined that was not a good move as work was making his pain worse. Claimant tried to talk with respondent about the accident and was again told respondent had no workers compensation insurance. Claimant later found out that respondent had not filled out any workers compensation forms. When claimant forwarded his medical bills to respondent, his boss Keith, would send those bills to the other truck driver's insurance company.

Claimant did not see a doctor again until December 2010 when he began to develop serious problems. Claimant went to Prairie Star to be examined, and it was determined that claimant's problems were related to the work accident in September 2010. Claimant was told that he would need to see a workers compensation physician. He eventually had an MRI, which revealed a herniated disk.

Prior to the accident, claimant was receiving treatment at Horizons Mental Health Center for depression, which was made worse by the accident. Claimant testified that he is now terrified of driving or being close to a truck. He has been in therapy for almost a year. Before that he hadn't been in therapy since his 1996 high school graduation.

Claimant does not own a vehicle and didn't before the accident. Instead, claimant gets rides from others to and from work and to appointments. Claimant testified that physically he can't work, as it is hard for him to walk and be on his feet for long periods of time without pain developing in his low back and left leg. Sometimes claimant's pain radiates down into his feet. By the time of his February 4, 2011, deposition, claimant had been using a cane to ambulate for about four months. However, he also indicated that it was several months after the accident when he began using the cane.

Claimant no longer works for respondent as he was fired a week or two after the accident. The only reason given was that he was no longer needed. Claimant testified that when he worked for respondent he was paid \$100 a day, with some overtime and no fringe benefits. Claimant testified that the day before he was fired, he witnessed someone keying his work truck and immediately reported it so that he would not get blamed. The next day claimant was fired.

About eight weeks after he was fired, claimant sought medical attention with Dr. Chris Gardiner because his pain was getting worse. Claimant was sent for an MRI. He was then told that there was nothing more Dr. Gardiner could do for him and that claimant needed to see a surgeon. Claimant denies any prior problems with his back or left leg.

In the past, claimant has had trouble finding work because of his learning disability,<sup>1</sup> his physical condition and his depression. The only real skill claimant has is driving a truck, which is the only type of job he has had since he graduated from high school.

Claimant has two child support obligations. He is unsure if he is the father to one of the children. There has been no paternity test. The other child is his.

Claimant first met with Dr. John Estivo on June 30, 2011, for treatment of his lumbar spine. Claimant saw Dr. Estivo at least five times. His final visit with Dr. Estivo took place on September 14, 2011, at which time claimant reported he was feeling better and had no complaints. He denied having cervical, thoracic or lumbar spine pain and also denied upper and lower extremity pain.

Although Dr. Estivo treated claimant multiple times and his deposition was taken in this matter, the ALJ failed to list the deposition as part of the record and made only one brief reference to Dr. Estivo in the Award. It is unclear whether the ALJ considered this deposition, with its attached exhibits, in this matter. The ALJ also failed to list or discuss the May 16, 2011, IME report of Terrence Pratt, M. D., appointed by ALJ Bruce E. Moore to perform an independent medical examination by Order of March 10, 2011.

Claimant began receiving Social Security disability in October 2011, for his physical and mental limitations. When claimant first applied for Social Security disability it was for his mental limitations. Claimant was found to be disabled as of August 1, 2008. His disability was defined as the inability to engage in substantial and gainful activity by reason of a medically determined physical and mental impairment or a combination of impairments.<sup>2</sup>

At the request of his attorney, claimant met with Dr. C. Reiff Brown, on October 13, 2011, for an examination. The record indicates claimant's attorney was provided a copy of this examination report on October 14, 2011, by fax. However, respondent was not provided a copy of the report until the day before Dr. Brown's deposition on February 3, 2012. Respondent raised timely objections to the deposition and all information associated with the October 13, 2011, examination, citing K.S.A. 44-515(c).

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<sup>1</sup> Claimant's reads and writes at a 5th grade level.

<sup>2</sup> R.H. Trans. at 31-32.

After respondent raised the K.S.A. 44-515(c) objections, claimant again met with Dr. Brown, on February 10, 2012, for another examination. This examination was completed to satisfy the objections raised under 44-515(c). The report generated by this examination was timely provided to respondent. A second deposition of Dr. Brown was conducted on February 27, 2012.

Since claimant's first examination with Dr. Brown, his discomfort had increased, even without being provoked with activity. Claimant reported pain in the midline lumbosacral area that had become constant and was gradually increasing in severity, with radiation to the right leg (right hip, posterior aspect of the right thigh and calf). Claimant reported that the pain had also begun to radiate into his left leg in the same distribution (left hip, posterior aspect of the left thigh and calf). Claimant met with his family physician, Dr. Albright, who provided medication, recommended claimant lose 30 pounds and referred claimant for pain management. Claimant met with Dr. Freizen for pain management and was given an epidural injection. Claimant was scheduled for two more injections.

Dr. Brown noted that claimant had a flare-up in his symptoms since he was last seen in October 2011. Dr. Brown stated that claimant's mild muscle spasm accounts for his list to the right and the arrhythmia of movement. He hoped claimant would continue to improve with the remaining two injections and felt claimant would benefit from a 2 week course of physical therapy with modalities and possible pelvic traction. He recommended claimant avoid lifting more than 20 pounds frequently until his symptoms settled down. He opined claimant was going to need medication indefinitely and may need surgery in the form of an L4-L5-S1 fusion. It was still his opinion that claimant has a 10 percent permanent partial impairment of function to the body as a whole due to the September 21, 2010, injury.<sup>3</sup> This rating was based on the 4th edition of the *AMA Guides*.<sup>4</sup>

After reviewing the task list of Robert Barnett, Dr. Brown opined claimant could no longer perform 22 out of 32 non-duplicated tasks, for a task loss of 68.8 percent. He agreed that, if the information in the task list was not accurate or complete, it would alter his task loss opinion.

A Motion Hearing was held on August 23, 2012, to address respondent's request to extend terminal dates pursuant to K.S.A. 44-523(b)(3). The reason for the extension was to allow respondent additional time to obtain all of claimant's previous employment records related to the 52 different employments claimant held over the 15 years prior to his injury. Respondent also took issue with some of the information that claimant provided during the creation of the task list, contending that some of the information was not accurate.

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<sup>3</sup> Brown Depo. (Feb. 27, 2012), Ex. 3 at 2 (Dr. Brown's Feb. 10, 2012, IME report).

<sup>4</sup> American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.).

This Motion Hearing transcript was not listed by the ALJ in the Award, nor was it discussed. The Order of August 24, 2012, allowing respondent an extension of its terminal date and ordering TTD at the same time, came as the result of this hearing. The Award also fails to discuss any payment of TTD by respondent resulting from this hearing and subsequent order, and no credit is given in the final award for any TTD payments that may have been made.

Robert Barnett, Ph.D. conducted a wage and task assessment of claimant via telephone on November 2, 2011. Mr. Barnett determined claimant had held 52 jobs over the past 15 years and 32 tasks were identified from those jobs. Mr. Barnett determined that claimant's average weekly wage at the time of the injury was \$400. He determined claimant had a 100 percent wage loss at the time of the interview simply because claimant was not working.

Mr. Barnett did not verify the job information provided to him by claimant and he does not have task information for several of the jobs claimant held over the last 15 years. This missing information could change the results of the assessment and the opinions of the doctors. The Award lists Dr. Barnett's deposition, but fails to mention respondent's many objections raised at the deposition.

#### **PRINCIPLES OF LAW AND ANALYSIS**

K.S.A. 2010 Supp. 44-523(a)(b) states:

(a) The director, administrative law judge or board shall not be bound by technical rules of procedure, but shall give the parties reasonable opportunity to be heard and to present evidence, insure the employee and the employer an expeditious hearing and act reasonably without partiality.

(b) Whenever a party files an application for hearing pursuant to K.S.A. 44-534 and amendments thereto, the matter shall be assigned to an administrative law judge for hearing and the administrative law judge shall set a terminal date to require the claimant to submit all evidence in support of the claimant's claim no later than 30 days after the first full hearing before the administrative law judge and to require the respondent to submit all evidence in support of the respondent's position no later than 30 days thereafter. An extension of the foregoing time limits shall be granted if all parties agree. An extension of the foregoing time limits may also be granted:

(1) If the employee is being paid temporary or permanent total disability compensation;

(2) for medical examination of the claimant if the party requesting the extension explains in writing to the administrative law judge facts showing that the party made a diligent effort but was unable to have a medical examination conducted prior to the submission of the case by the claimant but then only if the examination appointment was set and notice of the appointment sent prior to submission by the claimant; or

(3) on application for good cause shown.

Respondent requested several extensions to its submission date in this matter. The last was heard by the ALJ at the August 23, 2012, hearing earlier discussed. The statute allows for an extension of a parties submission date if certain criteria are met. Either the claimant is being paid TTD, for a medical examination of the claimant not scheduled to that point, or on application for good cause shown. In this instance, the ALJ found that good cause had been shown and also required respondent to pay TTD to claimant while the job investigation continued. The Board finds this inappropriate. The very hearing which caused this controversy was apparently ignored by the ALJ. It was not listed as part of the record and not discussed in the Award. Additionally, the ALJ failed to give respondent credit for any TTD amounts paid in this Award even though information detailing at least a portion of the TTD paid was contained in the record.

The award of TTD to claimant in the ALJ's August 24, 2012, Order in return for respondent's submission date extension is reversed. The finding of good cause was sufficient to grant respondent's request for an extension in this instance. Pursuant to the stipulated information from the parties, respondent paid a total of \$4,453.05 in TTD during the period from June 4, 2012 through September 7, 2012. Respondent will be granted a credit for those TTD payments in the final award.

K.S.A. 2010 Supp. 44-523(a) requires that a hearing be held and the parties be given a reasonable opportunity to be heard and to present evidence. In this instance, several sections of the Record were not listed and apparently not considered by the ALJ. Due process requires the right to present evidence. Due process is thwarted if that evidence, even though offered, is summarily ignored by the ALJ.

K.S.A. 2010 Supp. 44-555c grants the Board the jurisdiction to review questions of fact and law as presented to and determined by an administrative law judge. The Board is not granted original jurisdiction over workers compensation issues, but is limited to considering issues on appeal from administrative law judge decisions.<sup>5</sup>

Here, issues presented to the ALJ at the regular hearing and listed in the parties submission letters, were not addressed by the ALJ in the Award. This matter is remanded to the ALJ with the instruction to consider the entire record as presented by the parties and to determine all issues presented by the parties.

#### **CONCLUSIONS**

Having considered the record on appeal, the Board finds the Order requiring respondent to pay TTD in association with its request for an extension of its submission

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<sup>5</sup> K.S.A. 2010 Supp. 44-555c(a).

date is reversed and respondent is granted a credit for the amounts of TTD paid as the result of that Order. This matter is remanded to the ALJ for a determination of all issues as were presented by the parties and based upon a consideration of the entire record. This Order does not reopen the record for the purposes of taking new evidence. Any decisions of the ALJ shall be based upon the record as was previously compiled by the parties.

**AWARD**

**WHEREFORE**, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Thomas Klein dated February 4, 2013, is reversed with regard to the award of TTD in connection with respondent's request for an extension of its submission date and remanded to the ALJ with the instruction to determine all issues presented to the ALJ, based upon the entire record. This Order is not intended to allow the parties to present additional evidence, only to allow that their due process rights are properly protected in this litigation.

**IT IS SO ORDERED.**

Dated this \_\_\_\_\_ day of June, 2013.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

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